

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1492

77-1492

To be argued by
William S. Ellis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

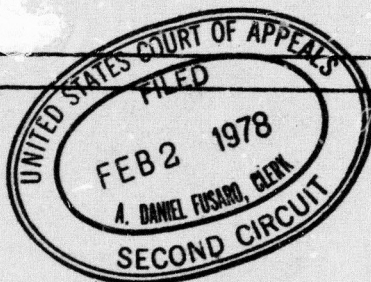
RAYMOND PHILLIPS,

Defendant-Appellant.

B/S

On Appeal from the District Court of the United States
for the Southern District of New York

APPELLANT'S BRIEF



WILLIAM S. ELLIS
Attorney for
Defendant-Appellant
51 East 42nd Street
New York, New York 10017

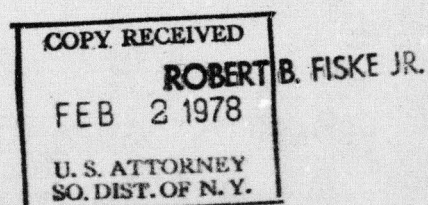
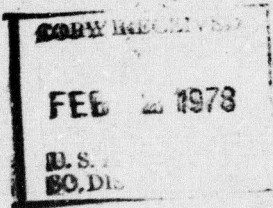


TABLE OF CONTENTS

	Page
Statement	1
The Trial	2
Facts	3
Statutes and Constitutional Provision Involved	9
Argument:	
Point 1-The court unduly restricted the scope of cross-examination and direct examination and thus prevented appellant from developing a defense of lack of specific intent, such restriction being prejudicial error	10
Point 2-The practice of the Federal prison system to forfeit an appellant's good time in a substantial amount and of the United States Attorney to prosecute the same appellant under 18 U.S.C. 751(a) is a vio- lation of the due process clause of the Fifth Amendment	17
Conclusion	19
Index of Cases and Other Authorities	
Alford v. United States, 282 U.S. 687 (1931)	15
Hutchinson v. United States, 450 F. 2d 930 (10th Cir. 1971)	17
Pointer v. Texas, 380 U.S. 450 (1965)	15
United States v. Nix, 501 F. 2d 516 (7th Cir. 1974). .	11
United States v. Snow, 484 F. 2d 811 (D.C. Cir 1973) .	10
United States v. Spletzer, 535 F. 2d 950 (5th Cir. 1976)	10
United States v. Stead, 528 F. 2d 257 (8th Cir. 1975).	17
United States v. Williamson, 469 F. 2d 89 (5th Cir. 1972)	17

Page

Statutes:

18 U.S.C. 751(a)		2,9
Fifth Amendment		9, 15
Sixth Amendment		10, 15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

RAYMOND PHILLIPS,

Defendant-Appellant.

APPELLANT'S BRIEF

Statement

Raymond Phillips appeals from a judgment of conviction entered by the Honorable Lee P. Gagliardi, District Court Judge for the Southern District of New York, on November 30, 1977, after a trial by jury.

Appellant Phillips was convicted on the one count of an indictment which charged that the appellant, on April 13, 1976, unlawfully, intentionally and knowingly did escape from the Federal Community Treatment Center, New York City, in which he had been confined by direction of the Attorney General of the United States by virtue of a

conviction under a law of the United States, in violation of 18 U.S.C. §751(a).

The appellant duly entered a plea of not guilty. On October 17, 1977, the appellant was tried before a jury, which ended in a mistrial. On October 31, 1977, the appellant was tried a second time before a jury. After two days of trial, he was found guilty of the charge of escape from the Federal Community Treatment Center, New York City.

Appellant was sentenced on November 30, 1977 to the custody of the Attorney General or his duly authorized representative for a period of 15 months.

The Trial

The government called five witnesses in support of its case, namely, Matthew Walsh, director of the Federal Community Treatment Center of New York City, Vincent Lenci, an officer with the Westchester County Parkway Police, Peter Ringler, a sergeant of the Westchester County Parkway Police and Julian Perez, special agent of the Federal Bureau of Investigation.

The appellant took the stand in his own behalf.

The government recalled Vincent Lenci as a rebuttal witness.

The Facts

Appellee's Proof

Raymond Phillips was incarcerated at the Federal Correctional Institution at Danbury pursuant to a judgment of conviction for the transportation of stolen vehicles in interstate commerce, 18 U.S.C. 2312. He duly transferred from the Danbury Correctional Institution to the Federal Community Treatment Center (Correction Center) in New York City. (App. 21, T.R. 21.)*

He duly signed a form in which he acknowledged that he had received a copy of the rules and regulations of the Correction Center. (App. 21, Ex. 3, T.R. 21, Ex. 3.) He also signed a form that he was aware of the penalties for escape from the Correction Center. (App. 21, 22, Ex. 4, T.R. 21, 22, Ex. 4.) Mr. Walsh was not present when the appellant signed these receipts and thus was unable to state that these documents had been, in fact, read to the appellant or that the appellant had read them. (App. 23, 24, T.R. 23, 24.) On April 13, 1976, the appellant failed to return to the Correction Center.

*"App." refers to the appendix prepared by the appellant. The transcript of the second trial is abbreviated "T.R." The number in the upper right hand corner of the Appendix is both the App. number and the T.R. number.

Approximately a year later, on April 14, 1977, Officer Lenci of the Westchester County Parkway Police noticed at about 3 A.M. a vehicle on the side of the highway with its flashing lights on. (App. 28, T.R. 28.) He investigated the situation and found a person sleeping in the car who identified himself as Robert Mueller. (App. 28, T.R. 28.) Officer Lenci then identified the appellant as Robert Mueller. He directed the person in the car to turn off his flashing lights and to roll the car back into a safe area. (App. 28, T.R. 28.) Then, he proceeded on his way, after calling in the plate number of the parked car. (App. 28, T.R. 28.) Later, he returned and took the person alleged to be Robert Mueller into custody. (App. 28, T.R. 28.) However, he never checked any of this person's identification to verify what was his name. (App. 29, T.R. 29.)

Officer Ringler of the Westchester County Parkway Police identified the appellant as the person introduced to him as Robert Mueller. (App. 32, T.R. 32.) He interviewed the appellant on April 14, 1977 about his identity, and the appellant wrote the name of "Raymond Phillips" on a piece of paper. He then removed the upper plate of his false teeth and copied his inmate's number from the

plate.

On April 14, 1977 Special Agent Perez of the F.B.I. took the appellant into custody. He informed the appellant of his constitutional rights. He asked the appellant why he had left the Correction Center, and the appellant answered that he had left because it was just a hassle. Agent Perez then asked the appellant if he had planned to return to the Center, and the appellant had replied that he had no intention of returning. (App. 34-35, T.R. 34-35.)

Appellant's Proof

The appellant took the stand and testified about the events leading up to his departure from the Correction Center. He had been asked three times by the Danbury authorities whether he wished to go to the Correction Center, and he had stated his wish to remain at Danbury. (App. 44-45, T.R. 44-45.) However, there came a time when he was directed against his will to go to the halfway house known as the Federal Treatment Correction Center. (App. 44-45, T.R. 44-45.)

On March 12, 1976, he was ordered to leave Danbury and to go to the Correction Center in New York. He arrived there on March 15, 1976. (App. 45, T.R. 45.)

He admitted that he had signed the form acknowledging the receipt of the rules and regulations, but that he had never received the rules and regulations. (App. 46, T.R. 46.) While he was at the Correction Center, he had worked at a pharmacy in the luncheonette department each day from 4 P.M. to midnight, and he had earned \$75.00 a week for salary and tips in the amount of \$15.00 per day. (App. 47, T.R. 47.)

During the first weekend, he had remained at the Correction Center. (App. 48, T.R. 48.) He also had remained at the Center during the second weekend. However, he was told by Mr. Moody, his counselor, to find a place to stay during the third weekend. He had stayed out on Saturday and Sunday, but remained in the Correction Center during the night. (App. 48-49, T.R. 48-49.) Before the fourth weekend, he was told that he had to find a place to stay during that weekend. He had informed Mr. Moody that he didn't have any place to go, but Mr. Moody only replied, "Well, we got places for you. We can send you back to Danbury." (App. 49-50, T.R. 49-50.)

The appellant produced a copy of the Pass Request (marked Exhibit A) in which he had requested permission to stay with Frank Ellwood at 324 West 84th Street, New York City. The pass was approved by Mr. Moody for the

fourth weekend. Frank Ellwood was his boss, and appellant had received authorization from him to use his name. (App. 51, T.R. 51.) Then, he had rented a room at the YMCA on 9th Street in Brooklyn after working on Friday night. (App. 52, T.R. 52.) However, since he had left with Mr. Moody the number to a pay telephone in the park at 84th Street and Riverside Drive, he had gone to that location at 9 A.M. on Saturday in order to be able to answer the phone when Mr. Moody called. (App. 52, T.R. 52.) The appellant had given Mr. Moody this telephone number as the number of where he was staying. On Sunday evening, he had duly returned to the Correction Center. (App. 53, T.R. 53.)

On the next day, he had received a message to see Mr. Moody. The appellant was then told by Mr. Moody that he was a wise guy for giving the pay telephone number. The appellant then testified:

"A I told him "You are making us go out for the weekends. You made us go out the first day I was here, so if I go out I got to find a place to live. If I don't go out you are going to send me back to Danbury, so either way I am wrong."

Q What happened then?

A He told me the next time I told him a lie about where I was staying on the weekend he was going to send me back to Danbury." (App. 54, T.R. 54.)

The next day the appellant went to work. Then the following day he went to work and didn't return because of "too much hassle."

He also stated that he had never identified himself to Officer Lenci or Ringler as Robert Mueller, and that all his identification papers had had his correct name. (App. 55, T.R. 55.)

On cross-examination, there was on minor discrepancy which the government developed, namely, Exhibit No. 5 which was a request by the appellant made out in the Center at Danbury for consideration for transfer to the Correction Center for purposes of obtaining employment and residency permanently. (App. 60, T.R. 60.)

Finally, the government called Officer Lenci and through him offered in evidence his report relating to the arrest of Robert Mueller.

Both sides then rested.

Statutes and Constitutional
Provision Involved

The statute provides, in pertinent part, as follows:

Title 18, Section 751(a), United
States Code.

§751. Prisoners in custody of institution or officer.

(a) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than \$1,000 or imprisoned not more than one year, or both.

The Fifth Amendment of the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

POINT 1

The court unduly restricted the scope of cross-examination and direct examination and thus prevented appellant from developing a defense of lack of specific intent, such restriction being prejudicial error.

The appellant in his request to charge asked the court to charge specific intent as an element of the crime of escape, citing United States v. Spletzer, 535 F. 2d 950 (1976), United States v. Snow, 484 F. 2d 811 (D.C. 1973). Though appellant objected to the language used by the court in its charge to the jury, still it is conceded that the court used substantially the language employed to define specific intent in United States v. Spletzer, supra, p. 954 ("a voluntary departure or absence

from custody with an intent to avoid confinement), and United States v. Nix, 501 F. 2d 516, 519 (7th Cir. 1974) (voluntary departure . . . with intent to avoid confinement). (App. 104, T.R. 104.)

However, the court failed to permit the appellant to develop an essential part of its defense, namely, that the pressures on the appellant arising from the Correction Center were so great as to impair his ability to form the requisite specific intent - in other words, that he fled from the Correction Center from a sense of compulsion. In his conversation with Special Agent Perez, the appellant said that he had left because it was just a hassle.

The appellant attempted at two crucial points during the trial to develop the components of this "hassle," but was prevented from doing so during the cross-examination of Matthew Walsh, the director of the Community Treatment Center, and during the direct examination of the appellant.

During the cross-examination of Mr. Walsh, the following exchange took place:

"Q Mr. Walsh, do you have a custom, after a man is received at your Center, of having him leave for weekends?

A That procedure --

MR. O'CONNOR: Objection.

THE COURT: Yes, sustained.

Q Is it the custom at your Center to permit prisoners who are there to leave for weekends?

MR. O'CONNOR: Objection.

THE COURT: Yes, sustained.

MR. ELLIS: Your Honor, may I --

THE COURT: I don't think it is necessary, no, sir.

Q How many floors are there at the Federal Center, Mr. Walsh?

MR. O'CONNOR: Objection.

THE COURT: I will sustain the objection.

Q Are you acquainted with the facilities of your Center, Mr. Walsh?

MR. O'CONNOR: Objection.

THE COURT: Yes, sustained.

MR. ELLIS: Your Honor, could I approach the bench?

THE COURT: No, I don't think so. Proceed. Rules 403 and 611.

MR. ELLIS: May I approach the bench for the purpose of making an offer of proof?

THE COURT: This witness will be available. He will be recalled if necessary. We will do that at the next recess."
(App. 25-26, T.R. 25-26.)

At the next recess, the court permitted appellant's attorney to make his offer of proof as follows:

MR. ELLIS: With reference to Mr. Walsh, may I say that I would like to make an offer of proof at this time, your Honor.

THE COURT: Yes.

MR. ELLIS: My offer of proof relates to the customs at the Treatment Center with which I think that he is familiar. I am talking, one, about the practice of permitting men to leave on the weekend and also whether there is any policy to encourage the men to leave on the weekend. I am talking also about the practice of having men who live on one floor and who don't leave for the weekend, because it is administratively convenient for the Treatment Center, to have those men who stay there for the weekend moved to another floor and to other facilities. And in order to avoid this kind of movement and to avoid an inconvenience to the agency, they in turn encourage these men to leave for the weekend, whether they wish to leave or not. The reason why I would like to offer this, your Honor, is because this goes to the question of too much hassle that my client was talking about. I would suggest to your Honor that it is relevant in terms of the limitations that I have imposed upon it and I would respectfully request that I be permitted to interrogate the witness." (App. 37-38, T.R. 37-38.)

In the colloquy between counsel and the court, the argument was made that this line of questioning was essential as to the issue of specific intent, but it was denied by the court.

Again, during the direct examination of the appellant, the same line of questioning was prevented by objections from the government:

"Q During that first week on what floor did you sleep?

MR. O'CONNOR: Objection.

THE COURT: Yes, sustained.

Q Were your facilities during the week and weekend the same, Mr. Phillips?

MR. O'CONNOR: Objection.

THE COURT: Sustained."
(App. 48, T.R. 48.)

It had been the plan of appellant to describe the conditions under which he lived at the Correction Center, the pressure from prison officials to compel him to leave the Center each weekend even though a prisoner had no home or place to go, the sense of being trapped and of being pushed out into the world before he was ready - these pressures finally propelling him away from the Center in a mood of panic. It was the intention of appellant to present these facts and to raise the issue of the voluntariness of his departure from the Center.

The court in citing federal rules of evidence 403 and 611 clearly meant to suggest that "the danger of unfair prejudice, confusion of the issues, or misleading the jury" outweighed the relevance of the testimony, and

that the scope of cross-examination was too broad. However, when the same line of questioning was attempted on direct examination of the appellant, the court again denied the appellant the right to inquire into these pressures.

It is suggested to this court that the appellant was denied the right to develop and present his defense, and the right to confront and cross-examine his accusers, thus impairing his right to a fair trial indirectly under the due process clause of the fifth amendment and directly under the sixth amendment of the federal constitution.

In Pointer v. Texas, 380 U.S. 400 (1965) the Supreme Court held that the sixth amendment right of an accused to confront the witnesses against him is a fundamental right. In Alford v. United States, 282 U.S. 687 (1931), the Supreme Court in unanimously reversing a federal conviction because the trial judge had sustained objections to questions by the defense seeking to elicit the "place of residence" stated as follows:

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and

his credibility to a test, without which the jury cannot fairly appraise them . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . ." (citations omitted.)

In this case, the complete refusal of the trial court to permit the appellant to explore the issue of those conditions at the Correction Center which resulted in tremendous pressures on the appellant and which impelled him to flee from the Correction Center, either in cross-examination or in direct examination, clearly impaired appellant's constitutional right to a fair trial. If the trial court had permitted some leeway to appellant, then there might have been grounds for determining whether the federal evidentiary rules 403 and 611 should have been invoked. However, to deny any latitude as here to appellant was so prejudicial as to require a new trial.

POINT 2

The practice of the Federal prison system to forfeit an appellant's good time in a substantial amount and of the United States Attorney to prosecute the same appellant under 18 U.S.C.

751(a) is a violation of the due process clause of the Fifth Amendment.

Appellant made an oral motion before the trial court to dismiss the indictment on the grounds of due process and double jeopardy. It was conceded that the Bureau of Prisons had administratively disciplined appellant and forfeited approximately 200 days of appellant's "good time." The trial court denied the motion.

There is little question that the contention that there is a double jeopardy in these circumstances has been consistently rejected. See Hutchinson v. United States, 450 F. 2d 930 (10th Cir. 1971); United States v. Williamson, 469 F. 2d 89 (5th Cir. 1972); United States v. Stead, 528 F. 2d 257 (8th Cir. 1975). It is also conceded that when this forfeiture was called to the attention of the trial court at the time of sentence, the court took this fact into account in imposing a sentence of 15 months on appellant.

Though the trial court was very fair at this point, still it is urged on this court that there is still a violation of due process. The forfeiture and the criminal

prosecution are different penalties imposed by different jurisdictions for the same "escape." The matter is not of great impact if only ten or fifteen days are forfeited, but where the forfeiture involves two-thirds of a year or more, the effect of this forfeiture is to sentence a prisoner to a substantial amount of additional time.

It is suggested that basic fairness to federal prisoners should require that where there has been a forfeiture of good time in excess of a half a year, the Bureau of Prisons and the Department of Justice should be required to elect which remedy will be applied. To impose both remedies, however legally correct, does not alter a basic unfairness to federal prisoners.

Appellant has found no cases which have dealt with this point under the argument of due process. All the cases dealing with this question have arisen under the argument of double jeopardy. However, it is suggested that both administrative discipline in forfeiting good time and prosecution for escape, despite the fairness of the trial judge at the time of sentencing, constitute a due process violation in this case.

Conclusion

For the reasons set forth above, the judgment of conviction should be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted,

William S. Ellis
Attorney for
Defendant-Appellant
51 East 42nd Street
New York, New York 10017

